(2)

No. 98-520

FILED
NOV 13 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1998

CLARA PALM,
and as Surviving Parent of
Anthony Robert Palm, deceased,

Petitioner,

v.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, a political Subdivision of Clark County, Clark County, a political subdivision of the State of Nevada, and Merl Sage, and Does I through V, inclusive,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS LAS VEGAS METROPOLITAN POLICE DEPARTMENT, CLARK COUNTY, AND MERL SAGE'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PETER M. ANGULO, ESQ.
Counsel of Record
RAWLINGS, OLSON, CANNON,
GORMLEY & DESRUISSEAUX
301 E. Clark Ave.,
#1000
Las Vegas, Nevada 89101
(702) 384-4012
Counsel for Respondents
Las Vegas Metropolitan
Police Department,
Clark County,
and Merl Sage

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

31pp

ISSUE PRESENTED FOR REVIEW

Whether the consistent factual statements by all witnesses to the event correctly supported officer Sage's use of deadly force against the decedent rapist?[1]

---

[1] Involved in the Ninth Circuit appeal were issues as to whether dismissal of Clark County was appropriate as an independent political subdivision under Nevada statutory and case law; whether the Judge correctly held there was no evidence of official capacity liability in the litigation; and whether the Judge was correct in holding that punitive damages were unavailable against municipal entities or individuals acting in their official capacity. In the Petition for Writ, however, it appears Petitioner is simply seeking to attack the factual arguments which sustained the use of force by Officer Sage. Accordingly, this Brief in Opposition is directed solely to that issue.

PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioner Clara Palm (hereinafter "Petitioner"), acting on behalf of herself and as the surviving parent of Anthony Robert Palm (hereinafter "decedent"). Appearing as Respondents before this Court are the Las Vegas Metropolitan Police Department (hereinafter "LVMPD"), Clark County, and Officer Merl Sage.

TABLE OF CONTENTS

Page

ISSUE PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

I. PROCEDURAL HISTORY 2

II. STATEMENT OF THE FACTS 5

LEGAL ARGUMENT 11

I. STANDARDS FOR GRANTING SUMMARY JUDGMENT 11

II. THE SHOOTING OF DECEDENT WAS NOT A FOURTH AMENDMENT VIOLATION 13

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 11

Avia Group Int'l, Inc. v. L.A. Gear Cal., 853 F.2d 1557 (Fed. Cir. 1988) 11

Balistreri v. Pacifica Police Dept., 901 F.2d 696 (9th Cir. 1990) 21

Brooks v. Pembroke City Jail, 722 F. Supp. 1294 (E.D.N.C. 1989) 16

Butts v. Carey, 706 F. Supp. 158 (D. Conn. 1988) 16

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 11

Curnow v. Ridgecrest Police, 952 F.2d 321 (9th Cir. 1991) 16

Eberle v. City of Anaheim, 901 F.2d 814 (9th Cir. 1990) 16

Graham v. Conner, 490 U.S. 386 (1989) 14, 15

Johnson v. Hackett, 284 F. Supp. 933 (E.D. Pa. 1968) 21, 22

Kennedy v. Allied Mutual Ins. Co., 952 F.2d 262 (9th Cir. 1991) 12

Komatsu, Ltd. v. States S.S. Co., 674 F.2d 806 (9th Cir. 1982) 12

Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) 21

McKenzie v. Lamb, 738 F.2d 1005 (9th Cir. 1984) 16

Michigan v. Summers, 452 U.S. 692 (1981) 15

O'Neal v. DeKalb County, Georgia, 667 F. Supp. 853 (N.D. Ga. 1987), *aff'd*, 850 F.2d 653 (11th Cir. 1988) 20

TABLE OF AUTHORITIES – Continued

Page

Program Engineering v. Triangle Publications, 634 F.2d 1188 (9th Cir. 1980) 11

Radobenko v. Automated Equip. Corp., 520 F.2d 540 (9th Cir. 1975) 12

Reed v. Hoy, 909 F.2d 324 (9th Cir. 1989), *cert. denied*, 501 U.S. 1250 (1991) 17

Richards v. Nielsen Freightlines, 602 F. Supp. 1224 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898 (9th Cir. 1987) 12

Screws v. United States, 325 U.S. 91 (1945) 21

Singleton v. Wulff, 428 U.S. 106, 96 S. Ct. 2868 (1976) 12

Still v. Williams, 919 F.2d 516 (9th Cir. 1990) 11

Tennessee v. Garner, 471 U.S. 1 (1985) 14, 17

Terry v. Ohio, 392 U.S. 1 (1968) 16, 19

Ting v. United States, 927 F.2d 1504 (9th Cir. 1991) 17

Turner v. County of Washoe, 759 F. Supp. 630 (D. Nev. 1991) 16

United States v. Elias, 921 F.2d 870 (9th Cir. 1990) 12

United States v. Patrin, 575 F.2d 708 (9th Cir. 1978) 12

Zoslaw v. MCA Distrib. Corp., 693 F.2d 870 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983) 11

TABLE OF AUTHORITIES – Continued

Page

RULES AND STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 2

Nevada Revised Statutes § 200.120 17

Nevada Revised Statutes § 200.130 18

Nevada Revised Statutes § 200.200 18

Supreme Court Rule 13(1) 1

Supreme Court Rule 13(3) 1

JURISDICTION

On April 14, 1997, the Honorable Chief Judge Lloyd D. George of the United States District Court for the District of Nevada, entered and served an Order which dismissed Petitioner's litigation in its entirety. *See* Petition at pp. App. 1-9. Thereafter, this matter was timely brought before the Ninth Circuit Court of Appeals and was subjected to its briefing schedule. After considering the briefs, the Ninth Circuit issued its opinion – sustaining the decision of Judge George. *See* Petition at pp. App. 10-16. The Opinion noted the consistent factual evidence in this case sustained the conclusion by Judge George the force used by Officer Merl Sage in this incident was completely justified.

That Opinion was issued on April 22, 1998. It is unclear to Respondents whether this Petition for Writ of Certiorari is timely filed. However, Respondents believe this Court would have disallowed the docketing of the Petition for Writ had it not been timely filed. Accordingly, Respondents believe jurisdiction of this Court is found under 28 U.S.C. § 1254(1) and pursuant to Supreme Court Rule 13(1) and (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents submit Petitioner's Complaint alleged violations of Fourth Amendment rights accruing to the decedent. It should be noted, however, Petitioner was never identified as the legal guardian of the estate of the decedent. Accordingly, she had no standing to bring a

claim for the decedent's damages. The only claim she could fashion would be one under the Fourteenth Amendment. Nevertheless, the analysis involved in determining the propriety of the Court's decision focuses around the Fourth Amendment since it involves issues of whether the force used against the decedent was appropriate. Thus, the Fourth Amendment is the only constitutional provision which is implicated by this Petition.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This matter was brought, via removal from State Court, before the United States District Court for the District of Nevada, Southern Division, pursuant to 42 U.S.C. § 1983, on December 28, 1995. The Complaint alleged a violation of the decedent's constitutional rights took place when excessive force was used against him by a person acting under color of state law. An Answer was filed on January 8, 1996.

An Amended Complaint was filed to cure the vagueness inherent in the first Complaint which also received an appropriate Answer. The Amended Complaint asserted the shooting of the decedent violated his constitutional rights, and that the shooting occurred in the context of a conspiracy.[2]

---

[2] The conspiracy claim issue was never raised on appeal and is not before this Court.

In the course of the litigation, a comprehensive Motion to Dismiss and for Summary Judgment on behalf of LVMPD, Clark County, and Officer Merl Sage was filed. That Motion, through the use of sworn testimony of key witnesses, attacked the validity of the Fourth Amendment claim. It argued the evidence clearly established the use of force by Merl Sage was appropriate.[3] After receiving an Opposition and Reply Points and Authorities supporting the Motion for Summary Judgment, the Honorable Lloyd D. George issued an extensive Order, on April 15, 1997, which ultimately disposed of the litigation. *See* Petition at App. 1-9.

In that Order, he properly set forth the facts of the case as established by the uncontroverted evidence. While he also disposed of issues which are not presently before this Honorable Court, he also, based on the facts before him, held no material fact existed as to how or why the shooting of the decedent occurred.[4] Having

---

[3] In addition, the Motion addressed the insufficiency of evidence regarding any official plan, policy or scheme of LVMPD which could be fairly said to have been the moving force behind any alleged constitutional violation. It also addressed the distinction between LVMPD and Clark County and indicated the County could not be held responsible for the actions of LVMPD under State interpretive law. Finally, it attacked punitive damages against municipal entities and also the dearth of factual evidence to establish a conspiracy claim. As indicated before in this Brief, these issues, however, are not the subject to this Petition for Writ. Instead, the focus is exclusively on whether the use of force was appropriate or not.

[4] Judge George took Petitioner to task for her "presentation" of the evidence in this case. Specifically, he noted that the presentation was "achieved only through an extremely liberal, if not deceptive, use of the evidence." *Id.*

reviewed the evidence in the light most favorable to the non-moving party, he concluded the actions of the decedent unquestionably warranted the use of force and, therefore, the death of the decedent did not rise to the level of constitutional violation. Accordingly, the litigation was dismissed.

On May 9, 1997, a Notice of Appeal on behalf of Petitioner was timely filed with the District Court. The matter then went before the Ninth Circuit Court of Appeals. Petitioner sent a pithy argument to the Circuit and focused on whether the evidence could sustain the decision of Judge George. On April 22, 1998, the Ninth Circuit issued a Memorandum Decision which supported, completely, the decision of Judge George in dismissing this litigation with prejudice. Petition at App. 10-16.

In making its decision, the Ninth Circuit noted – based on the evidence put before it – that every witness consistently saw an assault taking place between the decedent and Patricia Woodall. They were consistent in seeing the decedent either move towards or lunge at Merl Sage – after Merl Sage had ordered him to move away from the victim. Given the circumstances with which Merl Sage was faced, based on the evidence before it, the Ninth Circuit held under those circumstances that he acted reasonably when he fatally shot the decedent. Accordingly, summary judgment was affirmed.

II. STATEMENT OF THE FACTS[5]

On March 21, 1995 Patricia Woodall was taking a walk in the early morning hours. As she reached the corner of Mountain Vista and Tropicana, she was approached by a silver car which kept stopping and honking the horn – trying to get her attention. As she walked down a residential street, she saw the vehicle pass her and then turn a complete circle. Reaching the corner, she noticed the silver car parked and its driver (the decedent) crossing the street to approach her. She informed him she was going to call the police. He grabbed her, threw her to the ground and punched her repeatedly. They wrestled. *Id.* Ms. Woodall screamed until the decedent began to throttle her. She knew, at that point, she was dying.[6]

---

[5] As this brief was being prepared, it was determined the factual supporting documents which form the record in this case were inadvertently not sent to the printer. Accordingly, a revised answering brief, baring specific appendix citations will be filed as soon as possible.

[6] Wisely, Petitioner has chosen to back away from her originally ludicrous position that there was not a rape. Ms. Woodall testified:

> I, I could feel the stage come out of blackout and I knew if I kept going that he would keep going. The man wanted to kill me. He had, it was weird, _____ something but he wanted to kill me. And while I was looking, all this happened in a matter of seconds _____, and as I had my head sideways trying to do this, I seen this house that was across the street right where his car was parked as a matter of fact. Above it was a two story with a two window panes with no curtains there and the light was shining on him to where, um, you couldn't see inside of it and I

Other witnesses also observed this vicious, sadistic rape occurring. Mr. Mizell claimed he heard a loud argument which originally arrested his attention which was, at best, not "really . . . all that loud" by the time he was physically able to observe it. He saw the decedent was "holding the other one down" and, when the decedent dropped his pants, Mr. Mizell realized what was going on so "[he] dialed 9-1-1 immediately." He could hear Ms. Woodall pleading with the decedent to stop and begging him to explain why he was attacking her. He also indicated her face was bloodied and reddened following this gruesome attack.

Carol Ewing testified she thought wrestling was going on between two boys initially when she observed the event. However, she quickly realized one of the "combatants" was female and there was sexual activity occurring. She saw the victim pinned to the ground. So violent was the activity, when the decedent reached behind his back, she "thought he was reaching in his pocket for a knife or something to – to kill this person that was on the ground."

Janice Cobian testified that morning she heard a car door slam and a woman scream. The woman was yelling for help and that someone should get off of her.[7] She

---

said somebody is watching us and he's looking up sideways and I said just act like you're my boyfriend, and I won't let them take you. I thought maybe he would loosen up enough to where his hands on my throat so I could breathe and get my arms moving again or something.

[7] It was sufficiently loud that it virtually woke the entire neighborhood.

went to a window and saw a woman on a lawn with a man atop her – punching her in the face and head. That morning, at approximately 6 a.m., Officer Merl Sage and his wife were sleeping in their home. They were awakened by sounds of someone fighting. Their initial observation was two people appeared to be wrestling on the grass. As they changed their view and looked out the bedroom window, it became apparent a woman was being raped.[8] Their observation of the victim showed she was covered with blood on her face and body.

Confronted with this horrific scene, Merl Sage began to get dressed – at the same time grabbing his gun and attempting to dial 911. As his conversation with the dispatcher continued, he realized it would take too long to get the call processed – considering an active and violent rape was occurring outside.[9] Accordingly, he gave the phone to his wife and told her to inform the dispatcher he was going outside with a gun to try and stop the matter. As he ran to the scene, the decedent was still in the actual course of raping the victim.

Standing on the sidewalk to the right of the decedent, Merl Sage pointed his weapon at the decedent and yelled at him "[S]top it. Get away from her. Get back. Get back. Get away." Although his wife could not hear what he

---

[8] Mrs. Sage testified the man on top was choking the woman until she went limp; at that point, she saw him remove the victim's jeans and begin the rape.

[9] There is no question the contemporaneous perception of Officer Sage, as expressed to the 911 operator, was that a rape was going forward.

said, she saw him cross the street, saw her husband point the weapon at the suspect, and heard him yell at him.[10] The decedent snapped his head to the right and looked directly at Officer Sage;[11] he immediately started to get off the victim. He pulled on his pants.

The victim immediately got up and ran towards Mr. Sage. She was crying uncontrollably – virtually hysterical. She was clearly terrified. She was covered in blood from the blows which she had received from the decedent.

As she reached Merl Sage, the decedent (who was only 10-12 feet away) charged him. The victim saw a flash of movement. Officer Sage's wife, watching the matter from her home, also saw the decedent lunging forward and estimated that, with two steps, he had halved the distance between himself and her husband. Ms. Ewing testified she observed the rapist moving quickly towards the officer without ever stopping. Mr. Mizell testified the rapist immediately moved towards Merl.[12]

From Merl Sage's standpoint, he watched the assailant slide off the victim and, in a single continuous motion, stand, turn to his right, and charge towards Merl

---

[10] This scenario is consistent with the testimony of the rape victim and other witnesses.

[11] In doing so, the decedent looked directly at the weapon which the officer had which was pointed at him.

[12] Mr. Mizell could not tell the decedent "lunged" at Officer Sage because a palm tree was in the way.

in a semi-crouched state. In this tense situation, when the decedent was approximately 4-5 feet away, Merl fired his weapon. The event happened so quickly, Merl did not have time to actually pick up the front sight on his weapon and aim it. There was no question in his mind the decedent was charging at him to take control of the weapon. Officer Sage believed, had he been successfully charged, his weapon could have been taken away from him and both he and the victim would have been killed. The decedent died as the result of those gunshot wounds.

Dr. Jordan, the board-certified forensic pathologist from the Coroner Medical Examiner of Clark County, with over 30 years of experience testified *both* bullet wounds followed essentially the same path; both entered from the front of the body; both were in the upper right chest region *and* both were consistent with Officer Sage firing his weapon while the decedent was in a bent or lunging position.[13] The physical evidence did not reveal which shot was fired first but was consistent with a primary shot to the chest, followed by a second as the decedent crumpled. This directly comports with the consistent and unopposed sworn testimony of the witnesses.[14]

There is no question Officer Sage's actions were appropriate. The facts reveal this entire event took place

---

[13] The physical evidence also showed the decedent had a blood alcohol content of .250 at the time he was shot.

[14] Officer Sage testified he fired at "center of mass" – as he was trained – as opposed to trying to wing the decedent. This testimony is consistent with the first shot being more centered on the chest area.

in a matter of moments, that Officer Sage felt mortally threatened and that he withheld firing until the rapist was only 4-5 feet away and coming directly towards him. Any reasonable person, let alone a police officer, similarly situated, would have a geometrically increasing concern this violent rapist was charging him – especially knowing this criminal knew Merl not only was armed, but had the weapon actually trained on the decedent. Officer Sage legitimately feared for his personal safety and the safety of others in his immediate surroundings. Using deadly force in measured response to these legitimate perceptions cannot be seriously questioned.[15]

Based on these undisputed facts, both Judge George and the Ninth Circuit Court of Appeals properly held the actions of the decedent warranted the objectively reasonable belief of Officer Sage that force was required and, therefore, no constitutional violation could exist. On a Petition for Writ of Certiorari, it is respectfully requested this Court should sustain the decision of the Ninth Circuit Court of Appeals and vindicate the actions of Officer Sage in attempting to stop a horrific and bloody rape.

---

[15] Even Petitioner's own paid expert conceded that if the decedent was coming directly towards the officer, the shooting would have been a justifiable use of force.

LEGAL ARGUMENT

I. STANDARDS FOR GRANTING SUMMARY JUDGMENT

A grant of summary judgment is reviewed de novo. *Still v. Williams*, 919 F.2d 516, 520 (9th Cir. 1990). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *see Avia Group Int'l, Inc. v. L.A. Gear Cal.*, 853 F.2d 1557, 1560 (Fed. Cir. 1988).

The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983).[16] Once the movant's burden is met by presenting evidence which, if uncontroverted, would entitle the movant to a directed verdict at trial, the burden then shifts to the respondent to set forth specific facts demonstrating a genuine issue for trial. *Program Engineering v. Triangle Publications*, 634 F.2d 1188, 1193 (9th Cir. 1980).

---

[16] An issue is only "genuine" if the evidence is such that a reasonable jury, applying the applicable quantum of proof, could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Whether a fact is "material" depends on substantive law and whether the fact affects the outcome of the lawsuit. *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510.

This burden cannot be met by pleading mere conclusions. There *must* be specific facts showing a genuine issue for trial. A non-moving party is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture. *Richards v. Nielsen Freightlines*, 602 F. Supp. 1224, 1231 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898 (9th Cir. 1987) (mere allegations or denials, unsubstantiated hope, and threadbare conclusory statements are all insufficient once the moving defendant has met its initial burden).[17]

Evidence not put before the District Court is not considered when reviewing the appealed order or judgment. *United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990). A party must be careful to preserve the issues for appellate review. *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 2877 (1976) (quoted by *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978)). As evidence (or argument surrounding the sufficiency of evidence) not presented to or addressed by Judge George cannot be properly considered on subsequent review, so too may it be properly said legal arguments in opposition to the grant of summary judgment are not proper subjects of consideration when initially proffered only to the appellate court. *Komatsu, Ltd. v. States S.S. Co.*, 674 F.2d 806, 812 (9th Cir. 1982).

---

[17] Likewise, a party may not, in an attempt to avoid summary judgment, manufacture issues of fact by submitting conflicting sworn statements by that party. *Kennedy v. Allied Mutual Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991); *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 543-44 (9th Cir. 1975).

Under these facts, there is no question the actions of Officer Sage were entirely appropriate. Accordingly, the Ninth Circuit correctly ruled summary judgment was properly granted in favor of these LVMPD, Clark County, and Officer Sage.

II. THE SHOOTING OF DECEDENT WAS NOT A FOURTH AMENDMENT VIOLATION

The sworn facts of this case clearly establish a rape was occurring and Merl Sage attempted to stop it. Despite the fact he had his weapon pulled when he ordered the decedent to stop, looked directly at him and saw the weapon, the decedent nevertheless charged at him. This reckless behavior caused him to be shot when he was approximately 3-5 feet from Merl Sage – still in the position of coming forward.[18]

Mrs. Sage testified it looked as though the decedent intended to tackle her husband. The time involved was de minimus. In fact, Officer Sage testified the decedent would have reached him in less than a second. Accordingly, Officer Sage had an honest conviction and fear his

---

[18] At the time this event took place, tape recorded statements were made of the various witnesses. While these are not sworn statements and no signatures are found thereon, they were contemporaneously made by investigating officers at the time this incident took place and are consistent in relating the events in the same manner set forth in the Coroner's Inquest. Photographs taken of the victim immediately after this event also show she had been subjected to acts of violence.

life was in physical danger and he acted accordingly.[19] Considering these facts, the question becomes whether firing a weapon at the decedent under these circumstances rose to the level of a constitutional violation under the Fourth Amendment. It is respectfully submitted it did not.

The claim regarding the shooting incident is for excessive force. The use of force is generally considered to affect – in some circumstances – a seizure. "Whenever an officer restrains the freedom of a person to walk away, he has seized that person." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). *Graham v. Conner*, 490 U.S. 386 (1989), held, when claims of excessive force arise in the context of a citizen at liberty, the proper constitutional analysis comes under the Fourth Amendment right to be free from unreasonable seizures. Thus, the focus becomes whether the force used was *reasonable* or not.

"Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing government interest at stake." *Graham*, 490 U.S. at 396. Indeed, this balancing of competing interests has been identified

---

[19] Nowhere is this more tragically seen than in the brief exchange between husband and wife which was caught on the dispatch tape. The phone was portable. Mrs. Sage took it with her as she went to attend the victim. Reaching his side, she informed her husband that she was there. His simple statement was "I had to do it." Her attendant response was to assure him she knew he acted only because he had to.

as the *key* principle of the Fourth Amendment. *Michigan v. Summers*, 452 U.S. 692, 700 n. 12 (1981).

In *Graham*, this Court noted Fourth Amendment jurisprudence has long recognized some degree of physical coercion is necessary to effect a seizure. *Graham*, 490 U.S. at 396. The primary question is whether the force is *reasonable*. Because "reasonableness" is not capable of precise definition or mechanical application, the Court noted it required "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, *whether the suspect poses an immediate threat to the safety to the officers or others*, whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* (emphasis added). The objective reasonableness of the action "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.*[20]

---

[20] In such hostile and rapidly evolving circumstances, as an officer confronted with a potential threat from a violent suspect, the Court cannot ask an officer to hold fire to ascertain whether the suspect will, in fact, injure or murder the officer or an innocent bystander.

> It would be unreasonable to require police officers to take unnecessary risk in the performance of their duties. . . . every year in this country many law enforcement officers are killed in the line of duty and thousands more are wounded. Virtually all of these

This sentiment has been echoed in the Ninth Circuit. *Eberle v. City of Anaheim*, 901 F.2d 814 (9th Cir. 1990); *Turner v. County of Washoe*, 759 F. Supp. 630, 635 (D. Nev. 1991). "The reasonableness of force should be analyzed in light of such factors as the requirements for the officer's safety, the motivation for the arrest, and the extent of the injury inflicted." *McKenzie v. Lamb*, 738 F.2d 1005, 1011 (9th Cir. 1984).

> The court's inquiry is therefore whether the totality of the circumstances (taking into consideration the facts and circumstances of the particular case; including the severity of the crime at issue; whether the suspect poses an immediate threat to the safety of the officers or others; whether he is actively resisting arrest or attempting to evade arrest by flight) justified the particular type of seizure.

Curnow v. Ridgecrest Police, 952 F.2d 321, 325 (9th Cir. 1991).

Using these standards, courts have historically held force is acceptable when used to protect an officer or to subdue a combative arrestee. *See Brooks v. Pembroke City Jail*, 722 F. Supp. 1294 (E.D.N.C. 1989); *Butts v. Carey*, 706 F. Supp. 158 (D. Conn. 1988). It is clear Merl Sage acted

---

> deaths and a substantial portion of the injuries are inflicted with guns and knives. . . . in view of these facts, we cannot blind ourself to the need of law enforcement officers to protect themselves. . . .

Terry v. Ohio, 392 U.S. 1, 23-24 (1968).

appropriately in defending himself and the victim at the time of this incident. He had come upon a situation where a violent act of rape and physical abuse was occurring. The victim desperately screamed for help. She in fact thought she was dying because of being choked by the decedent. Officer Sage ordered the decedent to stop and, instead of obeying his clear and direct order, the decedent chose to charge Mr. Sage.

Given the violent behavior of the decedent in perpetuating the rape, it is only understandable Officer Sage believed his life was in danger. His verbal command for the decedent to back up had not worked. Displaying a weapon did not stop the decedent from lunging forward. Retreat would have been ineffective due to the short amount of time allowed within which he could have reacted. Only as a last measure did he fire his weapon in an act of complete self-defense. This act of instinctive self-preservation is not only understandable and reasonable, it is condoned – indeed, vindicated – by law.

It is universally recognized a person can use deadly force if, under the circumstances, he reasonably believed such force was necessary to protect himself or others from death or serious physical harm. *Reed v. Hoy*, 909 F.2d 324 (9th Cir. 1989), *cert. denied*, 501 U.S. 1250 (1991); *Ting v. United States*, 927 F.2d 1504, 1510 (9th Cir. 1991) (citing *Tennessee*, 471 U.S. at 10-12). In addition, Nevada clearly permits this type of force in this situation. A deliberate killing, if done in actual self-defense, is justifiable against a person who acts in a "violent, riotous, tumultuous or surreptitious manner . . . for the purpose of assaulting or offering personal violence to any person. . . . " N.R.S. § 200.120. The fear or apprehension of such injury must

be corroborated by "the fears of a reasonable person". N.R.S. § 200.130. An individual must show the force was used "under the influence of those fears and not in a spirit of revenge." *Id.*

When a person kills in self-defense, it need only appear the danger was "so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary" and the person who was killed was either the assailant or there had been a good faith effort to decline any further struggle before "the mortal blow was given." N.R.S. § 200.200. It cannot be gainsaid Officer Sage faced a situation in the present instance which presented precisely these facts to his attention.

Arriving on the scene, Merl Sage reasonably requested the decedent to immediately cease his behavior and move away from the victim. He did not immediately shoot the decedent; instead, he utilized a *show* of deadly force to keep the decedent under control by displaying his weapon.[21]

Rather than complying, the decedent quickly moved in the direction of Officer Sage. In two steps he had halved the distance between himself and the officer. He was still coming forward when he was shot. Every percipient witness testified the decedent moved directly in the direction of Officer Sage and was still moving in that direction when he was shot. Officer Sage believed the

---

[21] It is not denied the decedent looked directly at the weapon and Officer Sage and knew of their presence.

decedent was lunging for his gun. Clearly this was a situation fraught with the potential for deadly violence against the officer, the victim, and the surrounding neighborhood.

To have waited another instant could have meant the decedent and Merl became involved in a wrestling match for control of the gun. If wrested away, both Sage and the innocent victim could have been killed. It would be unreasonable to ask any person to take such a risk. In fact, this Court cannot require an officer to take such a risk. *Terry*, 392 U.S. at 23-24.

Certainly, given the short amount of time he had to react, Officer Sage had to make a split-decision. His honest and contemporaneous perceptions were that his life and the life of the victim were in immediate danger. Accordingly, he utilized the ultimate act of force and fired his weapon to defend both himself and the victim.[22] No objectively reasonable officer could claim that he acted inappropriately or that he could have attempted other avenues of force to defuse the situation.

Petitioner cannot and has not cited any constitutional jurisprudence that a police officer – facing a situation where an aggressive criminal was rapidly approaching,

---

[22] It must be remembered he was not in uniform at the time. The only weapon of defense available to him was a hand gun. He cannot be expected to sit back and allow a woman to be raped outside his home and do nothing. To allow Petitioner to pursue this action in the face of these overwhelming facts does a serious injustice to the commendable behavior which Merl showed in this instance in protecting the life of this young woman and his own life.

despite being ordered to stay put, is only 4-5 feet away and still approaching rapidly, and the officer is without backup – is required to withhold fire. To the contrary, courts resolutely hold the firing of a service weapon in such a situation is imminently justifiable. *See O'Neal v. DeKalb County, Georgia*, 667 F. Supp. 853, 858 (N.D. Ga. 1987), *aff'd*, 850 F.2d 653 (11th Cir. 1988) (the Constitution does not require police officers use the minimum of force when attempting to stop a suspect from using deadly force against a police officer or others).

Petitioner has argued Officer Sage was wrong for not identifying himself as a police officer. For this to have value, the Court must reach the conclusion that a criminal perpetrator who will not stop when confronted by a citizen who is armed with a firearm which is pointed directly at the perpetrator, *will* stop simply because the citizen announces that he/she is a police officer. Certainly there is no evidence in this case that that was true or that such an event is required before the use of deadly force is appropriate.[23] These arguments, therefore, are irrelevant

---

[23] Indeed, while Petitioner makes the argument Officer Sage was "on-duty" at the time he fired his weapon due to the fact that he was a police officer, it is also universally conceded Officer Sage utilized no outward trappings to indicate the indicia of authority. In other words, he showed no badge, failed to identify himself as a police officer, and had no unique markings that would have let the decedent know that he was, in fact, a police officer. To the decedent rapist's mind, Officer Sage could simply have been a conscientious citizen attempting to protect the life of another. Because the outward trappings of authority were not utilized to justify Officer Sage's behavior or attempt to gain compliance from the decedent, it could well be argued his actions failed to create a constitutional violation because there was no color of state law.

to the decision of whether the officer acted correctly in defending his life.

It is elemental that to sustain an action under § 1983 a plaintiff must show (1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of a constitutional right. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). Petitioner is unable to show under these circumstances that the conduct was committed by a person acting under color of state law.

This element is crucial to determining whether a § 1983 action has viability. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). This Court has held "that misuse of power, possessed by virtue of state law and made possible *only* because a wrongdoer is cloaked with the authority of state law, is action taken 'under color of' state law." *Lugar*, 457 U.S. at 929. The acts of the state employee must be under "pretense" of some state law. *Screws v. United States*, 325 U.S. 91, 111 (1945). That pretense is lacking if the wrongful acts are not, in any way, related to the performance of the duties of the state employee. *Johnson v. Hackett*, 284 F. Supp. 933, 937 (E.D. Pa. 1968). "[A]cts of officers in the ambit of their personal pursuits are plainly excluded." *Screws*, 325 U.S. at 111.

Johnson held that where two officers had provoked black citizens to fight based on their shouting of racial insults to those individuals and, indeed, offered to fight, and, thereafter, had the individuals arrested for disorderly conduct, those actions failed to occur under color of state law.

> The acts complained of here were not under "pretense" of law. They were not committed in the performance of any actual or pretended duty of policemen. They were not acts these defendants could not have committed but for the cloak of the state's authority. It is not alleged the offer to fight was in any way related to the performance of police duties. Quite to the contrary, the purely personal nature of the offer is emphasized by the allegation that, before the

Petitioner also conveniently ignores the fact her own expert testified that if, as the physical evidence absolutely mandates occurred, the decedent was coming directly towards the officer – after having been told to stop – then *the shooting would be justified*. While there may be an argument as to whether the decedent/rapist "lunged" or not, there is no question his movements were directly towards the officer and at a rapid pace.

What Petitioner expects, apparently, is that Officer Sage somehow be a Superman. When the show of deadly force was insufficient to stop the decedent rapist from approaching the officer in an aggressive manner, Officer Sage, should have utilized Kung-Fu, additional verbal judo, or perhaps said "pretty please." However, whether any of these actions would have stopped this crazed and drunken rapist from his irrational behavior is sheer speculation on the part of Petitioner and is completely unsupported by any evidence or testimony – either from percipient witnesses or from any expert in this case. Certainly, it is an insufficient basis upon which to predicate an opposition to summary judgment.

> challenge was issued, [the officer] removed his gun belt, laying aside, as it were, the symbol or "pretense" of police authority. As for the name-calling, I can conceive of no more "personal pursuit." No police duty or power of which I am aware can possibly be construed as clothing an officer with the authority of law to call anyone insulting names.

284 F. Supp. at 937. In this case, since there was no evidence that Officer Sage acted with the indicia of legal authority in firing his weapon, the failure of the presence of the color of state law was fatal to Petitioner's claims and was also appropriate as an alternative basis for dismissal.

In short, there is no evidence in this case Officer Merl Sage acted in a manner inconsistent with what any other objectively reasonable officer would have done under the same or similar pressing circumstances with which he was confronted on March 21, 1995. It is not sufficient to argue that alternative means were available to the officer in hindsight. The relevant analysis is whether, at the time the shooting occurred, given the stress of the situation, the fact that a bloody and violent rape was taking place in a quiet neighborhood, the fact that the decedent rapist saw Officer Sage wielding a weapon and refused to acquiesce to his commands, but, rather than fleeing *away* from the officer, came directly *toward* the officer, warranted this shooting. No objectively reasonable officer could have acted in a different manner. Accordingly, the Ninth Circuit affirmed that Judge George was absolutely correct when he held that no constitutional violation took place in this shooting. On appeal, this Honorable Court is implored to follow that same reasoning and deny the Petition for Writ or Certiorari for the frivolous attempt it is.

CONCLUSION

For the foregoing reasons, Respondents LVMPD, Clark County, and Merl Sage respectfully request this Court deny Petitioner's Petition for Writ of Certiorari and allow the Ninth Circuit decision to stand.

Respectfully submitted this 13th day of November, 1998.

PETER M. ANGULO, ESQ.
RAWLINGS, OLSON, CANNON,
GORMLEY & DESRUISSEAUX
301 E. Clark Ave., #1000
Las Vegas, Nevada 89101
Counsel for Respondents